United States Court of Appeals

for the Second Circuit

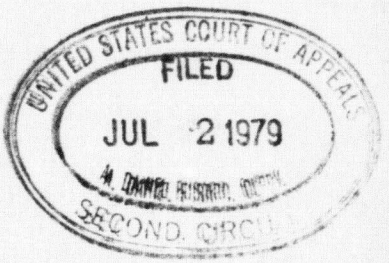
PETITION FOR REHEARING EN BANC

76-7510,62

pr'd

United States Court of Appeals

FOR THE SECOND CIRCUIT



ELGIE & COMPANY,

Plaintiff-Appellant,

—against—

S.S. "S.A. NEDERBERG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,

Defendant-Appellee and Third Party Plaintiff-Appellant,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant-Appellee.

PETITION OF SOUTH AFRICAN MARINE CORPORATION LTD. FOR REHEARING AND SUGGESTION FOR A HEARING IN BANC

BP/S

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M. E. DEORCHIS
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TABLE OF AUTHORITIES

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- against -

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Defendant-Appellee and Third-Party Plaintiff-Appellant,

- against -

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Third-Party Defendant-Appellee

PETITION OF SOUTH AFRICAN MARINE CORPORATION, LTD. FOR REHEARING AND SUGGESTION FOR A HEARING IN BANC.

PETITION FOR REHEARING

Petitioner-Appellee, South African Marine Corporation, Ltd. (hereinafter South African Marine), respectfully submits this petition for rehearing and suggestion for a hearing in Banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure relating to the reversal of the Opinion of the lower Court on June 11, 1979.

We respectfully request a rehearing in this litigation involving the application of Section 22 of the Pomerene Act on the grounds as set forth below.

This case centers on an issue of vital importance to the maritime industry of the United States. In a departure from other decisions of this Circuit, as well as from a decision of the Supreme Court of the United States, this Court has created a new category of liability based solely on negligent nondelivery of cargo at the port of discharge, and has thereby automatically deprived the ocean carrier of its right to the $500 per package limitation of liability under Section 4(5), U.S. Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1304(5).

This surprising interpretation comes 63 years after the enactment of the Pomerene Act and 43 years after the enactment of COGSA. It is frankly inconceivable that Congress would have specifically preserved the Pomerene Act in Section 3(4) of COGSA, 46 U.S.C. §1303(4) had it intended Section 22 to nullify the $500 per package limitation. As the District Judge stated on page 6 of his Opinion of August 29, 1978:

> "If the package limitation of COGSA is inapplicable because of the Pomerene Act in a negligent loss of cargo case, the burden of proof and the relationships among the parties to these maritime commercial transactions would be dramatically altered some 62 years after the Pomerene Act was first passed. The Act's scope was not intended to be so great since its purpose lay in curbing deliberate fraud."

This Court's new interpretation of Section 22 is based on its review "of that section in its historical context". While the legislative history of the Pomerene Act discussed infra does not in any way support the Court's conclusion, the text of Section 22 (Appendix I) by itself demonstrates that that section is inapposite in the present case. According to its plain meaning, Section 22(b) cannot apply in the present case. It is not enough that the holder of a bill of lading has relied upon the bill's description of the goods; Section 22(b) also requires that his damages be caused by (1) nonreceipt of goods as of the date stated in the bill of lading, or (2) failure of the goods to correspond with their description in the bill at the time of issue. There can be no doubt that the carrier (South African Marine) received all 12 packages, including the crate containing the lens grinding machine, prior to issuing its "received for shipment" bill of lading on March 15, 1974, as evidenced by the dock receipt (Joint Appendix 87a-88a), issued by International Terminal Operating Co., Inc. (hereinafter ITO). Therefore the first causal element - nonreceipt by the carrier - obviously does not exist. A reasonable construction of the alternative cause - failure of the goods to correspond with their description in the bill of lading at the time of its issue - also deprives the statute of application here, since the "received for shipment" bill dated March 15, 1974, was perfectly accurate in its description of the nature and number of goods received into South African Marine's

custody on that date. (See a copy of the bill of lading which is attached to this Petition as Appendix II; a somewhat illegible copy of the same bill appears in the Joint Appendix 87a. It should be noted the bill was issued on March 15, 1974.)

Section 22 does not require that the goods correspond to their description in an "on board" bill; it makes no distinction between an "on board" bill and a "received for shipment bill", because the carrier fulfills its duty under this section by the act of taking custody of the goods, whether or not they are actually loaded on the vessel. This becomes quite clear when the statutory language is interpreted in light of the purpose and historical context of the Pomerene Act (infra). But it is also apparent from the facts of the present case that plaintiff's damages could not, as the alternative clause of Section 22 requires, have been caused by the misdescription resulting from the "on board" endorsement of South African Marine's bill of lading. The "received for shipment" bill of lading is evidence of the contract of carriage, whether or not the goods are loaded on board. It contained the terms and conditions of the contract of carriage (and significantly, extended the COGSA package limitation to the entire period the goods were in the custody of the carrier, not merely the period after the goods were loaded on board). The carrier's liability for loss or damage to the goods was fixed under COGSA from the date of its issue. "On their face these words [Received for Shipment] connote that the signer has received into his custody the goods described, at the place and on the date

stated, with the expressed purpose of carrying them to the named port of destination, either in a named vessel or simply in an 'unnamed vessel' or a 'substituted vessel.'" A. Knauth, The American Law of Ocean Bills of Lading, 142 (4th ed. 1953).

As the record indicates, it was a matter of indifference in which vessel and on what precise date the goods were shipped (Joint Appendix, 184a); in fact a substitution was expressly permitted by Clause 2 of the carrier's long form bill of lading (594a). Under the general maritime law, where cargo is received by the carrier under a "received for shipment" bill of lading, and no time for shipment is specified, the carrier is obligated to make delivery within a reasonable time. W. A. Lighter & Co. v. United States Shipping Board Emergency Fleet Corp. ("The Newburgh"), 24 F.2d 536, 537 (E.D. La. 1928), aff'd, 33 F.2d 288 (5th Cir. 1929). This Court did not challenge the lower court's finding that the crate containing the lens grinding machine was shipped aboard the S.A. Morgenster on March 16, 1974. Elgie would have received the crate on or about May 4, 1974, but for the nondelivery, an occurrence which may be anticipated with some regularity when large quantities of goods are moved over great distances by sea. Plaintiff without doubt suffered damages from the unexplained failure to deliver the grinding machine, buts its damages can be attributed to the misdescription in the bill of lading endorsed aboard the Nederburg on March 24, 1974 only by a metaphysical interpretation of Section 22. That section, as will be amply demonstrated

infra, applies where bills of lading are issued for goods never received at all, i.e., for goods left at an inland point of shipment, or lost by a railroad carrier in transit to the port - in other words before the goods ever reach the carrier at the port of loading - or for bills of lading issued by an agent without the corresponding delivery to the carrier of the goods purporting to be issued, in order to prevent the carrier from escaping liability altogether under the rule of Friedlander v. Texas Pacific Railway, 130 U.S. 416 (1889). A more detailed description of the practices which Section 22 was enacted to circumvent is contained in Hearings before the Senate Committee on Interstate Commerce on S. 4713 and S. 957, S. Doc. No. 650, 62d Cong., 2d Sess. 113-15 (1912).

In the present case, the carrier is not seeking to avoid its responsibility for nondelivery, but only to exercise its statutory right to limit its liability under Section 4(5) of COGSA. Section 3(7) of COGSA provides that the carrier shall, at the shipper's request, issue a "shipped" bill of lading, 46 U.S.C. 1303(7). This provision of course improves the credit standing of the bill, and in the present case the "on board" endorsement was required by Elgie in order to comply with the terms of the letter of credit. But as this Court implicitly recognized in Miles Metal Corp. v. M.S. Havjo, 494 F.2d 563 (2d Cir. 1974), there is nothing talismanic about an "on board " bill. Having fulfilled its duty under Section 3(7), the carrier ought not to be deprived of its rights under Section 4(5) where goods subsequently lost are in fact loaded aboard a vessel.

With respect, the Court errs in attempting to apply the estoppel doctrine of Olivier Straw Goods v. Osaka Shosen Kaisha, 47 F.2d 878 (2d Cir.), cert. denied, 283 U.S. 856 (1931) unless it is prepared unequivocally to declare as "clearly erroneous" the finding of the lower court that the cargo was shipped aboard South African Marine's vessel. Olivier II held only that a failure to ship the cargo at all "with its consequent loss or destruction on land" was a deviation operating to deprive the carrier of the benefit of valuation clauses in a bill of lading, 47 F.2d 878, at 880. This Court has so far not contradicted the obvious implication of the lower court's finding of shipment that the loss of the crate occurred during the performance of the contract of carriage. Where there is no factually demonstrable deviation, under the general law valuation clauses are to be respected; this is a fortiori true where the valuation clause is mandated by an Act of Congress, as under Section 4(5) of COGSA, which provides:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . ." (Emphasis added.) 46 U.S.C. 1304(5).

Whatever doubt the language of Section 22 may leave as to its applicability to a case of negligent nondelivery may be resolved by reference to the legislative purpose and historical context of the Pomerene Act. It is here, especially, that this Court loses sight of a basic principle pointed out by the late Justice Frankfurter that "legislation has an aim; it seeks to

obviate some mischief, to supply an inadequacy . . . [t]hat aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in light of other external manifestations of purpose." F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Columbia L.R. 527, at 538-39 (1947).

HISTORY OF THE POMERENE ACT

The Pomerene Act had its origin in the work of the Conference of Commissioners on Uniform State Laws, which in August 1909 adopted an act to make uniform the law of bills of lading entitled the Uniform State Bill of Lading Act ("UBLA"). Section 23 of the UBLA provided that if a bill of lading were issued by a carrier or on its behalf by an agent or employee, the scope of whose actual or apparent authority included the issuing of bills of lading, the carrier would be liable for misdescriptions in the bill. Section 23 was drafted in response to fraudulent practices in the American cotton trade circa 1910, whereby railroad agents would issue bills of lading for goods never received. Preface to the Uniform Bill of Lading Act, January 1, 1910, American Uniform Commercial Acts 225 (Cincinnati, 1910). See also A. Knauth, The American Law of Ocean Bills of Lading, 338-394 (4th Ed. 1953). In particular, the provision was designed to alleviate the difficulties created for the shipper by the Supreme Court's decision in Friedlander v. Texas Pacific Railway, 130 U.S. 416 (1839), in which the fraudulent acts of the agents were held to be ultra vires and not binding on the carrier.

An examination of the legislation relative to bills of lading introduced in Congress prior to the enactment of the Pomerene Act reveals that the impetus for the Federal Act came from the same adverse commercial effects of the Friedlander decision.

The predecessor bill of the Pomerene Act, introduced on January 22, 1912, was considered by the Senate Committee on Interstate Commerce concurrently with a shorter version, S. 957, introduced by Senator Clapp of Minnesota, which dealt primarily with the liability of a common carrier for an act of its agent in giving a receipt for goods not in fact received. Stressing the necessity for remedial legislation, the Committee reported out the Clapp Bill because it feared that the more comprehensive Pomerene bill would not pass the House. S. Rep. No. 728, 62d Cong., 2d Sess. 2 (1912). While the Pomerene Bill in its final form was unquestionably broader in scope than the Clapp Bill, the successive Committee Reports leave no doubt that the purpose of Section 22 was to "modif[y] the law as laid down in the Friedlander case." S. Rep. No. 309, 63d Cong.,2d Sess. 2 (1914); S. Rep. No. 149, 64th Cong., 1st Sess. 2 (1916). The specifically remedial purpose of Section 22 was further emphasized in the floor debate on the final bill by the bill's sponsor, Senator Pomerene:

> "It seems to me that if we could get only one provision of this bill passed we ought to waive everything else and let it be passed. I refer to that provision which seeks to correct the rule laid down by the Supreme Court in the so-called Friedlander case. The substance of the holding in that case was that if a freight agent were to issue a bill of lading for goods and did not receive the goods therefor the railroad company would not be held responsible.

> Because of the doctrine in this case and in previous cases upon that subject, frauds aggregating millions of dollars have been perpetrated upon the public, not only in this country, but in our foreign commerce as well." 53 Cong. Rec. 12589 (1916)

It would be superfluous to cite further examples from the various hearings, committee reports, and floor debates in which the role of Section 22 as a corrective to the Friedlander case is repeated in almost liturgical fashion. S. Rep. No. 728, 62d Cong., 2d Sess. 2 (1912); S. Doc. No. 650, 62d Cong., 2d Sess. (1912). It should be pointed out, however, that the testimony of Professor Samuel Williston, the draftsman of the UBLA and Francis B. James, then Chairman of the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws, during Senate hearings held on the predecessor bills of the Pomerene Act in 1912, indicates that the bills were directly aimed at eliminating a limited range of specific abuses, such as the issuance of fraudulent or accommodation bills. Hearings before the Senate Committee on Interstate Commerce on S. 3713 and S. 957, S. Doc. No. 650, 62d Cong., 2d Sess. 12-13, 56, 72-77 (1912).

While the Pomerene Act did, to some extent, systematize the existing law merchant with respect to the rights and liabilities of shipper and carrier, as well as the transfer and negotiability of bills of lading, Section 22 did not expand the liability provisions of its counterparts in the earlier bills, and indeed is substantially the same as UBLA Section 23, with the exception of the 1927 Amendment (44 Stat. 1450) which included the date of shipment as part of the description of the goods. Nothing in

the legislative history of the Act indicates that Section 22 was intended to codify the general law of carrier liability for negligent misdescription or nondelivery. The Pomerene Act is in fact only one relevant statute regulating the function of bills of lading, which must be read in conjunction with the Uniform Commercial Code and COGSA. See Gilmore and Black, The Law of Admiralty, 95, 96 (2d Ed. 1975).

The narrow field of application of Section 22 has also been judicially confirmed by the Supreme Court in Gleason v. Seaboard Airline Ry., 278 U.S. 349 (1929), at 357-58:

> "Section 22 deals only with the former rule that agents having authority to receive merchandise and issue bills of lading were without implied authority to issue the latter except on receipt of the merchandise. It enlarged the agent's implied authority by imposing a new liability on the principal for the agent's act in issuing the bill, even though the merchandise was not received."

Until now, no Court anywhere has shown itself willing to extend these well-defined limits.

This Court, however, reasons that since the common law made the carrier responsible for negligent misstatements in bills of lading, the Pomerene Act could not impose a lesser standard of liability. Once the carrier loaded the cargo aboard the ship and issued bills of lading, the general maritime law, with certain exceptions, made it absolutely responsible for the safety of goods in its custody. The purpose of COGSA was to remove this strict liability and in turn to preclude the carrier from complete exoneration through "negligence clauses" in contracts of carriage

by balancing the interests of both shipper and carrier. An essential and longstanding part of this balance is the $500 per package limitation of liability under Section 4(5) of COGSA. Although Section 3(4) does provide that none of its provisions shall be construed as repealing or limiting any of the Pomerene Act's, [t]his Proviso does not alter the Rules [COGSA] but merely preserves a necessary legislative adjustment of the body of American case law." A. Knauth, The American Law of Ocean Bills of Lading, 389 (4th Ed. 1953). This case law was, of course, Friedlander and its progeny, which the Pomerene Act specifically overruled. The COGSA saving clause was intended to preserve the Pomerene Act, particularly its most vital part - Section 22 - from judicial modification or implied repeal. This Court has shown excessive zeal in its attempt to preserve the 1916 Act, and in fact renders nugatory the application of the COGSA $500 per package limitation to ordinary non-delivery of cargo, a situation which Section 4(5) was plainly intended to cover.

The purpose of the proviso in Section 3(4) of COGSA was explained in S. Rep. 742, 74th Cong., 1st Sess. 1 (1935):

> "The [proviso] is intended to preserve in effect the provisions of the Pomerene Act which hold a carrier liable for receipt of goods signed for by its representatives even though they may not actually have been received, this provision of the Pomerene Act having been found necessary to prevent abuses that were being practiced with damage resulting due to the negotiable character of the bill of lading."

The report further stresses that the Act was meant to close a judicial "loophold" leading to "frauds on a large scale" in instances where the carrier never received the goods for shipment.

That Section 3(4) of the COGSA was intended to preserve the remedial function of Section 22 is also apparent from the Official Statements accompanying the Act of Congress implementing the 1924 Brussels Convention. For example, the Memorandum of the Department of State, dated June 5, 1937, reproduced in 51 Stat. 269, comparing COGSA and the Brussels Convention states relative to Section 3(4):

> "The proviso [preserving the Pomerene Act from repeal] is primarily for the protection of subsequent holders of bills of lading. Prior to the enactment of the Pomerene Act a number of cases had arisen in the United States in which shippers had induced representatives of common carriers to sign bills of lading receipting for goods on the shipper's assurance that the goods would later be delivered to the carrier. The shippers would then dispose of the bills of lading through the usual discounting procedure. Subsequently these shippers for various reasons sometimes failed to deliver the goods to the carrier. The courts in the United States held that the fact that the goods never came into the custody of the carrier was a good defense to relieve it of liability to the holder of the bill of lading. The Pomerene Act changed this law so as to place the liability under such situations on the carrier." (Emphasis added.)

The Department of State also elucidated the relationship between the Pomerene Act and COGSA in its note to the Italian Government in 1938, reproduced in A. Knauth, supra, page 86, by stating "that none of the provisions of the Pomerene bills of lading act are deviations from the principles underlying the Bills of Lading Convention . . . ." It is clear from both the 1924 Bill of Lading Convention (Article 4, Section 5) and from COGSA Section 4(5) that the package limitation was not meant to be displaced by the preservation of Section 22 or any similar legislation.

When two statutes are capable of co-existence, the Courts are obliged to regard each as effective in the absence of a clearly expressed Congressional mandate to the contrary. Morton v. Mancari, 417 U.S. 535 (1974). This Court has created a conflict between COGSA and the Pomerene Act, disruptive of the purposes of both Acts as manifested by their legislative history. Section 3(4) of the COGSA makes the bill of lading merely prima facie evidence of the carrier's receipt of the goods where, as in the present case, the carrier receives the goods but fails to deliver them, and Section 4(5) applies the $500 limitation where the carrier is negligent; Section 22 of the Pomerene Act binds the carrier without benefit of limitation when the carrier or its agents, without receiving the goods, fraudulently issue bills of lading.

Petitioner respectfully submits that the notion that "judges are expected to refrain from legislating in construing statutes" is neither a naive nor outmoded principle. Frankfurter, supra, at 535. The Pomerene Act, which was enacted to prevent fraud, no more, no less, should not be given a construction which would itself work fraud between the consignee and the carrier where no intent to defraud exists. The Capitaine Faure, 10 F.2d 950, 959 (2d Cir.), cert. denied, 271 U.S. 684 (1926). "Cases in which recovery is sought for the nondelivery of goods . . . and in which the recitals in the false bills of lading are significant only as admissions which the carrier is estopped to deny, rather than as the basis of an action for fraud, must be distinguished." Toho Bussan Kaisha, Ltd. v. American President Lines, 115 F. Supp. 886, 889 (S.D.N.Y. 1957), aff'd, 265 F.2d 418 (2d Cir. 1959). Petitioner does not deny its responsibility for the nondelivery

of the grinding machine during performance of its contract of carriage under the provisions of COGSA, subject to its right to limitation, but it resists with the utmost vigor the finding of fraudulent intent which must follow from the application of Section 22 of the Pomerene Act.

CONCLUSION

We respectfully request that this petition for rehearing with a suggestion for hearing in Banc be granted because material issues of law were overlooked and misapprehended, which, had they been given due consideration, would have brought about a result that has been consistently applied in federal Courts throughout the United States for the last 43 years.

Dated: New York, New York
July 2, 1979

Respectfully submitted,

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BRIAN D. STARER

[redacted]

ADDENDUM

Appendix I

"Liability for nonreceipt or misdescription of goods

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to . . . (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue." (Emphasis added.)

46 U.S.C. §102

SOUTH AFRICAN MARINE CORPORATION (N.Y.), as Agents

SHIPPER/EXPORTER

SHAREN CONTINENTAL
40 HUMBOLDT ST.
ROCHESTER, NEW YORK

DOCUMENT NO.

EXPORT REFERENCES

CONSIGNEE

ORDER OF SHIPPER

FORWARDING AGENT, REFERENCES

COPELAND SHIPPING INC. 11321-02
SUBSIDIARY: JET AIR FORWARDERS — FMC #1065 — IATA #22
PORT AND COUNTRY OF ORIGIN AMERICA, N.Y. 11422 (212) 341-22

NOTIFY PARTY

ELGIE & COMPANY
P.O. BOX 1899
DURBAN

DOMESTIC ROUTING/EXPORT INSTRUCTIONS

RECEIVED ON

MAR 21 1974

PRE-CARRIAGE BY (Vessel and Flight)

PORT OF LOADING

ONWARD INLAND ROUTING

VIA

PER

FOR TRANSHIPMENT TO

S.A. NEDERBURG
DURBAN

Spaces above are for shippers' memoranda — not part of Bill of lading

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS.	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
ELGIE & COMPANY PO BOX 1899 54-55 GARDINER ST DURBAN SOUTH AFRICA 403M, 291M, 290M 289M, 288M, 287M 286M,	11 1	TW.CTNS:) OPTICAL MACHINERY & CRATE:) ACCESSORIES. L/C# FB 1396 "FREIGHT PREPAID" ON BOARD	4512	381

RECEIVED
MAR 21 1974

G-DEST. SOUTH AFRICA

These Commodities licensed by the U. S. for Ultimate Destination
Diversion Contrary to U. S. Law Prohibited.

*as identified on the reverse side and referred to herein as "the carrier." Neither South African Marine Corporation (N.Y.), nor any other person, firm or corporation other than the carrier, whether or not its name is stated elsewhere herein, assumes any of the duties, responsibilities and liabilities stated herein as being those of the carrier.

Ship operated for account of: →
(See on reverse side)

FREIGHT:

	per 40 cu. ft.	$
	per 40 cu. ft.	$
	per 2240 lbs.	$
	per 2240 lbs.	$
		$
		$
TOTAL FREIGHT		$

In witness whereof 3 (Three) Bills of Lading, all of the same tenor have been signed, one of which being accomplished the others to stand void.

B/L No. | Month | Day | Year 19

DATED AT PORT OF LOADING SHOWN ABOVE

FOR AND ON BEHALF OF MASTER

By AS AGENTS ONLY

APPENDIX #II

RECORD PRESS, INC., 157 CHAMBERS ST., N. Y. 10007, (212) 243-5775